

- (2) Is claimant entitled to reimbursement for unauthorized medical expenses?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant, Sandra Christman, is permanently totally disabled as a result of an injury occurring on January 4, 1989, while employed by the respondent.

The claimant, activities director for the respondent, was injured on January 4, 1989, when a patient she was helping lift from a wheelchair began to slip. While bending over holding the patient, the claimant felt a sudden pain down her spine beginning in the area of her neck. Shortly thereafter she began noticing pain and symptoms from the mid-back down to the low-back and extending into her leg. Her left leg began going to sleep and it began buckling under her while she walked.

Claimant was referred to Dr. Edwards who took x-rays, sent her home for two weeks, and ultimately referred her for an MRI. The MRI was followed by a myelogram, both of which confirmed claimant had suffered a herniated disc.

Claimant was then referred to Dr. Majzoub and Dr. Hood and underwent back surgery in January 1990 with Dr. Mosier and Dr. Dillon. Subsequent to the surgery, the claimant's upper extremity problems resolved somewhat until she went to Lenexa for work hardening when her problems with the neck and left shoulder again worsened. She was referred to Dr. Bernard M. Abrams in February 1992.

An MRI attempted in February 1992 was not completed because the claimant could not remain on the table long enough for the MRI to be completed.

Currently, the claimant experiences problems in her neck, shoulders, left arm and fingers. Sitting aggravates her condition, as does using the left arm for any extended period of time. Standing for more than three or four minutes causes her left leg to go numb and then her back becomes painful. If she walks too much her leg buckles. She also experiences pain symptoms in her right leg and at times feel as though her middle back has been struck with a baseball bat.

She currently spends three or four mornings a week at the local YMCA, either in water aerobics, the jacuzzi, or the hot tub. This water therapy allows claimant to return home and remain active for approximately forty-five minutes before the symptoms return.

Claimant experiences difficulty riding and driving in cars, and sitting, standing and walking all aggravate her condition.

Claimant is a high-school graduate with one year of college and one year of secretarial training. She currently is unable to hold down a full-time secretarial job as she would have difficulty sitting for long periods of time. She cannot return to the nursing home activities because she cannot lift or walk as the job requires.

She is not limited in her use of a telephone so long as she holds the phone in her right hand. When she holds the telephone with her left hand, the arm, hand, and fingers become numb.

When Dr. Abrams examined the claimant, he found her to be post L3-4 and L4-5 discectomy and L4 laminectomy. A follow-up EMG showed an absence of right H-Reflex which is connected with the S1 nerve end sign. X-rays showed hypertrophic spurring of her spine. Claimant had a severe authentic change to the lumbar spine with neck pain and range of motion restrictions. Dr. Abrams assessed claimant a five percent (5%) permanent partial impairment to the body as a whole as a result of the neck problems and a thirty to thirty-five percent (30-35%) permanent impairment to the body as a whole as a result of her lumbar spine problems, giving a total of forty-one and one-fourth percent (41.25%) functional impairment. This impairment rating included a ten percent (10%) factor for multiplicity with the entire impairment being related to her work accident. Dr. Abrams, later in his deposition, agreed that under the *AMA Guides*, the multiplicity percentage that he added should have been subtracted.

The claimant was limited to no climbing, walking ten minutes at a time with a maximum of one hour per day, driving thirty minutes at a time with a maximum of two hours per day, avoiding rough roads and heavy equipment, sitting restricted to one hour at a time with three hours total per day, and standing restricted to thirty minutes at a time with a total of two hours per day. Claimant was able to do simple reaching and grasping maneuvers as long as she honored the weight restrictions, but repetitive use of the hands was limited to one hour per day, again with the weight restrictions set by the doctor. Dr. Abrams felt that it would be extremely difficult for claimant to return to employment for eight hours per day as it would have to be an extremely structured situation where she could get up and move around if necessary and lie down if the pain became too great. He opined that at best she was limited to a maximum of approximately five hours per day active work.

The claimant was examined and evaluated by Mr. Monty Longacre, a vocational rehabilitation specialist, at the request of the respondent and insurance carrier. Mr. Longacre assessed claimant at eighty percent (80%) loss of ability to perform work in the open labor market and a sixty-five percent (65%) loss of ability to earn a comparable wage. He opined her expected income would be a maximum of approximately eighty-five dollars (\$85.00) per week which he believed to be as good as it was going to get. He had no opinion as to whether this would be considered substantial gainful employment. He admitted the part-time limitations placed upon the claimant by Dr. Abrams would take her out of many job situations but testified that the *Dictionary of Occupational Titles* is not restricted to full-time employment and that there were jobs open to the claimant in a part-time capacity.

Claimant was examined by Mr. Jerry Hardin at the request of the claimant's attorney. Mr. Hardin felt the claimant had suffered a one-hundred percent (100%) loss of ability to perform work in the open labor market and a one-hundred percent (100%) loss of ability to earn a comparable wage due to her restrictions. He gave no opinion as to the claimant's abilities to perform part-time work or how her limitations to part-time work would affect her ability to perform work in the open labor market or to earn a comparable wage.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

“Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”

Burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

K.S.A. 1992 Supp. 44-510c(a)(2) defines permanent total disability as follows:

“Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.”

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 1992 Supp. 44-510c(a)(2), it does leave to the trier of fact the responsibility of determining the “existence, extent and duration of an injured workman’s incapacity” Boyd v. Yellow Freight Systems, Inc., 214 Kan. 797, 522 P.2d 395 (1974).

It has been held in Kansas that when a workers compensation statute is subject to more than one interpretation, it must be construed in favor of the worker if such construction is compatible with Legislative intent. Houston v. Kansas Highway Patrol, 238 Kan. 192, 708 P.2d 533 (1985). A finding that a claimant is permanently and totally disabled because he is essentially and realistically unemployable, is compatible with Legislative intent. Wardlow v. ANR Freight Systems, Inc., 19 Kan. App. 2d 110, 113 (1993). In Wardlow the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in Wardlow, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled. In this instance, the claimant has been diagnosed by Dr. Abrams, the only medical doctor to testify in this matter, as being extremely limited physically, in significant constant pain, in need of position changes, limited in ability to stand, sit, or walk for any extended periods of time, unable to work a full eight-hour day, and requiring an extremely structured situation where she could get up, move around, and lie down as needed. Uncontradicted medical testimony unless shown

to be improbable, unreasonable or untrustworthy, may not be disregarded. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The claimant's limitations lead us to the conclusion that she is essentially and realistically unemployable and thus incapable of substantial and gainful employment.

The Appeals Board finds, based upon the record as a whole after reviewing all of the evidence, that claimant is permanently and totally incapable of engaging in any type of substantial and gainful employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 12, 1994, is affirmed in all respects and the claimant, Sandra Christman, shall be and is hereby awarded compensation against the respondent, Gentry House of Arma and Liberty Mutual Insurance Company, for an accidental injury sustained on or about January 4, 1989, based upon an average weekly wage of \$244.56, for permanent total disability. The record indicates claimant has been paid temporary total compensation in the amount of \$26,748.27 but the record is void of information as to what rate this temporary total was paid or for how many weeks. As such, the Workers Compensation Appeals Board awards claimant \$125,000.00 at the rate of \$163.05 per week commencing January 4, 1989, less amounts previously paid, until fully paid or until further order of the Director.

As of May 18, 1994, there would be due and owing 280.14 weeks of compensation at the rate of \$163.05 per week, totalling \$45,676.83, which is ordered paid in one lump sum less amounts previously paid. The remaining balance of \$79,323.17 shall be paid at the rate of \$163.05 per week until fully paid or until further order of the Director.

The Appeals Board further awards claimant reimbursement of up to \$350.00 unauthorized medical expense upon presentation of an itemized statement showing such expenses were incurred.

Claimant is further awarded continuing medical maintenance care without further order for routine medical maintenance but claimant must apply for authorization to incur additional medical expense above and beyond routine maintenance care not agreed to by the respondent, with the said application to be filed with the Director of Workers Compensation for the State of Kansas.

K.S.A. 44-536(b) requires that all attorney fees in connection with the initial or original claim for compensation be fixed pursuant to a written contract between the attorney and the employee or employee's dependents which shall be subject to approval by the Director in accordance with this section. No such attorney fee contract appears in the record and, as such, no attorney fees for claimant's counsel can be approved by the Appeals Board. Any claim for attorney's fees by the claimant's attorney in this matter shall be reviewed by the Workers Compensation Director pursuant to K.S.A. 44-536(b) as to the appropriateness of said fees subsequent to the filing of said contract with the Director.

The fees necessary to defray the expenses of the administration of the Workers Compensation Act are herein assessed against the respondent and insurance carrier to be paid as follows:

William F. Morrissey

Special Administrative Law Judge Fee	\$150.00
Martin D. Delmont, CSR	
Transcript of Regular Hearing	\$ 61.95
Deposition of Sandra Christman	180.65
Deposition of Jerry Hardin	<u>177.95</u>
Total	\$420.55
Patricia K. Smith	
Deposition of Monty Longacre	\$191.85
Janet S. VanLeeuwen, CRS	
Deposition of Bernard Abrams, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton Kennard, PO Box 1449, Pittsburg, KS 66762
John I. O'Connor, PO Box 1236, Pittsburg, KS 66762
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director